

**IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT**

Appeal No. ED101588

BYRNE & JONES ENTERPRISES, INC.
d/b/a BYRNE & JONES CONSTRUCTION,

Appellant,

v.

MONROE CITY R-1 SCHOOL DISTRICT, et al.

Respondents.

**REPLY BRIEF OF APPELLANT BYRNE & JONES ENTERPRISES, INC. d/b/a
BYRNE & JONES CONSTRUCTION**

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POINTS RELIED ON

I. The Trial Court erred in dismissing Count I of Plaintiff Byrne & Jones Enterprises, Inc.'s ("Byrne & Jones'") Petition in that Byrne & Jones had standing to challenge the award of a Design Build Contract by the Monroe City R-1 School District ("District") to another firm because the District did not permit all bidders to compete on equal terms and/or did not give all bidders a fair opportunity to bid and/or because the District acted arbitrarily, capriciously, unfairly, and, therefore, Byrne & Jones had standing to enjoin the award of the District's contract to the other bidder.

La Mar Constr. Co. v. Holt County, R-II School Dist., 542 S.W.2d 568 (Mo. Ct. App. 1976).

Metropolitan Express Services, Inc. v. City of Kansas City, 23 F.3d 1367 (8th Cir. 1994).

Public Communications Services, Inc. v. Simmons, 409 S.W.3d 538 (Mo.App. W.D. 2013).

State ex rel. Johnson v. Sevier, 98 S.W.2d 677 (Mo. banc 1936).

II. The Trial Court erred in dismissing Count I of Plaintiff Byrne & Jones Enterprises, Inc.'s ("Byrne & Jones'") Petition in that Byrne & Jones had standing to challenge the award of a Design Build Contract by the Monroe City R-1 School District ("District") to another firm because the District did not permit all bidders to compete on equal terms and/or did not give all bidders a fair opportunity to bid and/or because the District acted arbitrarily, capriciously, unfairly, and, therefore, Byrne & Jones had standing to recover its bid preparation costs from the District.

La Mar Constr. Co. v. Holt County, R-II School Dist., 542 S.W.2d 568 (Mo. Ct. App. 1976).

Marbucco Corp. v. City of Manchester, 137 N.H. 629 (N.H. 1993).

Meccon, Inc. v. Univ. of Akron, 126 Ohio St. 3d 231 (Ohio 2010).

Planning & Design Solutions v. City of Santa Fe, 118 N.M. 707 (N.M. 1994).

ARGUMENT

I. The Trial Court erred in dismissing Count I of Plaintiff Byrne and Jones Enterprises, Inc.'s ("Byrne & Jones'") Petition in that Byrne & Jones had standing to challenge the award of a Design-Build Contract by the Monroe City R-1 School District ("District") to another firm because the District did not permit all bidders to compete on equal terms and/or did not give all bidders a fair opportunity to bid and/or because the District acted arbitrarily, capriciously, unfairly, and, therefore, Byrne & Jones had standing to enjoin the award of the District's contract to the other bidder

A. Respondents misapply case law regarding Byrne & Jones' Standing

Respondents' Brief misapplies case law regarding the standing of a public bidder to challenge the bidding and award procedure utilized by a public entity under Missouri's competitive bidding laws. Further, Respondents' mischaracterize Byrne & Jones' claims. Contrary to Respondents' contention, Byrne & Jones does not need to allege, or have, a specific pecuniary interest in the award of the District's contract for the design and build of the Monroe City School District stadium facility (the "Project") to have standing to pursue its claims.

Byrne & Jones does not allege, in its Petition, that, as the low bidder on the project, it is lawfully entitled to be awarded the District's contract. Byrne & Jones did not ask the Trial Court for the award the District's contract nor does it seek to recover the lost profits it would have realized if it had been awarded the contract. Instead, Byrne & Jones contends that, as a participant in the Missouri competitive bidding process and pursuant

to Missouri public policy, it is entitled to “have a fair opportunity to compete in a field where no favoritism is shown or may be shown to other contestants.”¹ Byrne & Jones specifically alleges that the District, in bidding and awarding its public contract, “acted arbitrarily, capriciously, unfairly and in violation of the competitive bidding processes required[,]”² and, “did not act in good faith, *or in the best interest of the public*, but acted in collusion with ATG and with personal favoritism for ATG.” (L.F. 7)(emphasis added).

Although Respondents cite Missouri cases that have denied standing to unsuccessful bidders, those cases are distinguishable from this case. In *Metcalf & Eddy Services, Inc. v. St. Charles* the court held that the plaintiff, an unsuccessful bidder, did not have standing to sue on its claim that it should have been awarded the contract because it submitted the lowest bid. 701 S.W.2d 497, 499 (Mo. Ct. App. 1985). In its suit, Byrne & Jones did not seek an award of the contract.

La Mar Constr. Co. v. Holt County R-II Sch. Dist., is also distinguishable from this case because the plaintiff’s (“La Mar’s”) petition contained no allegations that the action was brought to protect the public interest. 542 S.W.2d 568, 570 (Mo. Ct. App. 1976). Also, unlike Byrne & Jones, La Mar requested that the contract be awarded to it. *Id.* at 569. The court explained that La Mar’s allegations and prayer for relief demonstrated that La Mar considered that it had a right to the contract because it was the lowest bidder and that it was entitled to protect and enforce a private right. *Id.* at 570. Byrne & Jones does not allege this.

¹ *State ex rel. Stricker v. Hanson*, 858 S.W.2d 771, 778 (Mo.Ct. App. 1993).

² (L.F. 7).

Respondents improperly cite *State ex rel. Johnson v. Sevier* as a case that supports the trial court's dismissal. The *Sevier* case is both distinguishable from the present action and also provides support for Byrne & Jones' standing to bring the claims alleged in its Petition. Like the *La Mar* court, the *Sevier* court concluded that nowhere in the petitioners' petition did it appear that "the suit was brought to protect the interests of the petitioners and the public as taxpayers of the State." *State ex rel. Johnson v. Sevier*, 98 S.W.2d 677, 679 (Mo. banc 1936). The *Sevier* court found that the petition did not allege that the action was brought on behalf of the public or to protect the interests of the public." *Id.* The court concluded that the "allegations of the petition together with the prayer for relief clearly show that petitioners thought they had a lawful right to the contract on the alleged ground that they were the lowest and best bidders..." *Id.*

In this case, Byrne & Jones, a Missouri corporation, participated in the competitive bidding process for the award of the District's contract to design and build the Project. (L.F. 2-11). Byrne & Jones alleges the District disregarded the competitive bidding processes and "did not act in good faith, or *in the best interest of the public*["] (L.F. 7)(emphasis added). Further, Byrne & Jones does not ask the court to award it the District's contract and is not attempting to enforce its right to be awarded the contract as the lowest and best bidder. Instead, Byrne & Jones challenges the bid procurement and award procedures utilized by the District.

Respondents incorrectly analyze the *Metropolitan Express Servs. v. City of Kansas City* decision. The *Metropolitan* court did not rely on *Hanson* for the proposition that "that an unsuccessful bidder has standing to challenge a contract that was not fairly

bid[.]” as Respondents suggest. Instead, the court merely cited the *Hanson* court’s acknowledgment that “competitive bidding procedures for public contracts should ensure that all who may wish to bid shall have a fair opportunity to compete in a field where no favoritism is shown or may be shown to other contestants.” *Metropolitan Express Servs. v. City of Kansas City*, 23 F.3d 1367, 1371 (8th Cir. Mo. 1994)(internal citations omitted). The court relied on the standing requirements found in *Harrison v. Monroe County*,³ that a plaintiff has standing to sue if he alleges “some threatened or actual injury resulting from putative illegal action[.]” and that the “interest which plaintiff seeks to protect must be ‘within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.’” *Id.*

Applying Missouri standing requirements, the *Metropolitan* court held that an “unsuccessful bidder that was denied a fair opportunity to bid on a public contract is within the zone of interests to be protected by competitive bidding requirements[.]” and concluded that “an unsuccessful bidder has standing to challenge a contract that was not fairly bid.” *Id.* (This is not “dicta” as Respondents state in their brief). The court reversed the district court’s dismissal and granted *Metropolitan* standing because it alleged that the City disregarded competitive bidding procedures, and deprived it of the opportunity to bid. *Id.* at 1370-1371.

The factual differences in this case and the *Metropolitan* case cited by Respondents only support *Byrne & Jones*’ standing. Here, Respondents argue that, in

³ *Harrison v. Monroe County*, 716 S.W.2d 263, 266 (Mo. banc 1986).

Metropolitan, “the plaintiff did not bid on the contract and did not claim that it should have been awarded the contract.” See Respondents’ Brief at pg. 13. First, like the plaintiff in *Metropolitan*, Byrne and Jones does not allege that it should have been awarded the contract. Second, the fact that Byrne & Jones actually submitted a bid on the Project gives Byrne & Jones a greater interest in the competitive bidding procedure than the non-bidding plaintiff in *Metropolitan*.

B. The District’s Right to Reject Any and All Bids Does Not Permit the District To Circumvent Competitive Bidding Requirements

The District’s right to reject any and all bids under Mo. Rev. Stat. § 177.086 does not allow the District to disregard proper and fair competitive bidding procedures, with total immunity from bidder’s challenges as Respondents suggest. In *Public Communs. Servs. v. Simmons*, Public Communications Services, Inc. (“PCS”) filed suit against the Office of Administration under Mo. Rev. Stat. § 536.150 and Mo. Rev. Stat. § 34.040, to challenge the propriety of the State’s award of a contract to another bidder. *Public Communs. Servs. v. Simmons*, 409 S.W.3d 538, 543 (Mo. Ct. App. 2013). PCS alleged the award was unlawful, under § 34.040, because the State failed to solicit competitive bids and that the state acted arbitrarily and capriciously in selecting the other bidder as the lowest and best bidder. *Id.*

Mo. Rev. Stat. § 34.040 states, in pertinent part, that:

The contract shall be let to the lowest and best bidder. The commissioner of administration *shall have the right to reject any or all bids* and advertise for new bids...

§ 34.040.3 R.S.Mo. (emphasis added).

Although the statute gave the state broad discretion in awarding state contracts, the *Public Communs. Servs.* court found that “[d]espite the general rule refusing to afford losing bidders standing to challenge the award of government contracts, Missouri decisions recognize that members of the public have standing to challenge a contract award where the contracting authority exercises its discretion to solicit and evaluate bids unlawfully or capriciously.” *Public Communs. Servs.* at 546. Despite the statutory right, under Mo. Rev. Stat. § 34.040.3, to reject any and all bids, the court held that plaintiff’s allegations challenged the fairness and lawfulness of the procurement process by which another entity was awarded the contract and, therefore had standing to assert its claims. *Public Communs. Servs.* at 547.

The *La Mar* court heard a challenge to Section 177.086 R.S.Mo (1969) which, like Mo. Rev. Stat. § 34.040.3 in *Public Communs. Servs.*, gave the school district the right to “reject any and all bids”. *La Mar* at 569. The court, in its opinion, explained:

Safeguards for public protection are built into the statute and they require that a school board exercise its discretion responsibly. The rejection of the lowest bid must not be made fraudulently, corruptly, capriciously or without reason. The officials must exercise and observe good faith and accord all bidders just consideration, avoiding favoritism and corruption.”

La Mar at 571.

Both the *La Mar* and *Public Communs. Servs.* decisions acknowledge the duty of public entities to fairly bid and award their contracts in accord with Missouri competitive bidding policy, despite the broad discretion expressly given to the public entity to “reject any and all bids.” The *Public Communs. Servs.* court recognized the duty imposed on public entities to “exercise and observe good faith and accord all bidders just

consideration, avoiding favoritism and corruption[.]”⁴ and acknowledged that bidders deprived of a fair opportunity on public contracts have standing to challenge a public entity’s disregard of its duty. Byrne & Jones should be allowed to do so in this case.

II. The Trial Court erred in dismissing Count I of Plaintiff Byrne & Jones Enterprises, Inc.’s (“Byrne & Jones”) Petition in that Byrne & Jones had standing to challenge the award of a Design-Build Contract by the Monroe City R-1 School District (“District”) to another firm because the District did not permit all bidders to compete on equal terms and/or did not give all bidders a fair opportunity to bid and/or because the District acted arbitrarily, capriciously, unfairly, and, therefore, Byrne & Jones had standing to recover its bid preparation costs from the District.

A. *La Mar* Does Not Dispose of Byrne & Jones’ Claim For Recovery of its Bid Preparation Costs

Respondents incorrectly argue that *La Mar* disposes of Byrne & Jones’ claim for recovery of its bid preparation costs. *See* Respondents’ Brief at pg. 18. In *La Mar*, the court based its holding on the fact that *La Mar* asked the court for lost profits as damages from the School District. The court explained that if an “unsuccessful bidder may recover its **lost profits** from a school district...[t]his is not a means of protecting the public that is to be encouraged. *La Mar* at 571(emphasis added). Byrne & Jones requests damages only for the **bid preparation costs** it expended in preparing a bid that was to be inevitably

⁴ *Public Communs. Servs* at 546.

rejected by the District based on the District's collusion with and favoritism of ATG. Recovery of bid preparation costs is a reasonable and appropriate remedy for Byrne & Jones because the District's disregard of the competitive bidding procedures denied Byrne & Jones the right to participate in public bidding where all contestants compete on a level playing field.

B. Awarding Bid Preparation Costs To Bidders Who Successfully Establish That a Public Entity Violated Competitive Bidding Law Furthers Missouri's Competitive Bidding Policy

Contrary to Respondents' contention, providing a cause of action for the recovery of bid preparation costs to bidders who successfully challenge the competitive bidding procedures used by a public entity will protect the interest of the public by insuring that public entities will abide by competitive bidding procedures. In Missouri, public contracting requirements "are for the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption in the awarding of municipal contracts, and to secure the best work or supplies at the lowest price practicable, and are enacted for the benefit of property holders and taxpayers, and not for the benefit or enrichment of bidders, and should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest." *O. J. Photo Supply, Inc. v. McNary*, 611 S.W.2d 246, 248 (Mo. Ct. App. 1980) (internal citations omitted).

Other state courts, recognizing that competitive bidding laws are enacted for the benefit of the public and not bidders, have, nonetheless, identified bidders as advocates

for the public's interest. Courts in many states allow successful challengers to recover bid preparation costs as an incentive to the challenge governmental action for the assurance that the public receives the best product at the lowest possible price.⁵

In *North Twin Builders, LLC v. Town of Phelps*, the court acknowledged that the competitive bidding statute at issue in that case was "designed not for the benefit of individual bidders, but for the benefit of the public." 800 N.W.2d 1, 4 (Wis. Ct. App. 2011) (internal citations omitted). Further, the court referenced a prior court decision that rejected another plaintiff's claims for lost profits, concluding, "[t]axpayers are not are not protected when any governmental body pays twice for the performance of one contract..." *Id.* at 5 (internal citations omitted). The *North Twin Builders* court, however, specifically discussed whether recovery of bid preparation costs is consistent with public policy underlying the competitive bidding statute and concluded that "allowing recovery of such costs is not synonymous with requiring the public bidding authority to pay twice for the performance of one contract." *Id.*

In *Marbucco Corp. v. City of Manchester*, the New Hampshire Supreme Court, heard a bidder's challenge to the award of a public contract and considered the issue of

⁵ See *Neilsen & Co. v. Cassia & Twin Falls County Joint Class A Sch. Dist.*, 103 Idaho 317, 319 (Idaho Ct. App. 1982) (allowing damages for time expended, overhead, and attorney fees, but denying lost profit damages and attorney fees on appeal); *Telephone Associates v. St. Louis County Bd.* 364 N.W.2d 378, 383 (Minn. 1985)(allowing recovery of bid preparation costs, and expenses, including reasonable attorney fees, but not lost profits); *State Mechanical Contractors, Inc. v. Pleasant Hill*, 132 Ill. App. 3d 1027, 1032-1033 (Ill. App. Ct. 4th Dist. 1985) (holding that an unsuccessful bidder on a public works project who submits the best responsive bid has a cause of action to recover from the public body the expenses incurred in preparing and presenting that bid); *City of Atlanta v. J. A. Jones Constr. Co.*, 260 Ga. 658, 659 (Ga. 1990)(holding that a low bidder whose bid is unfairly rejected is entitled to an award of reasonable costs of bid preparation); *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority*, 23 Cal. 4th 305, 308 (Cal. 2000)(affirming that bid preparation costs were recoverable under a theory of promissory estoppel); and *Owen of Georgia, Inc. v. Shelby County*, 648 F.2d 1084, 1099 (6th Cir. Tenn. 1981)(holding bidder could recover bid preparation costs).

whether a disappointed low bidder on a municipal contract may recover money damages from the municipality for failure to award it the contract. 137 N.H. 629 (N.H. 1993). The *Marbucco* Court explained that it is “the municipality’s obligation to protect the public interest and to avoid weakening public confidence in government, it is required to treat all bidders fairly and equally.” *Id.* at 632-633. While the court acknowledged that “the bid itself is an offer that creates no right until it is accepted[.]”⁶ it held that “money damages are appropriate for wrongful failure to award a contract to the lowest responsible bidder...” *Id.* at 634. The *Marbucco* court explained that “damages ordinarily should be limited to the expenses incurred by the low bidder in its fruitless participation in the competitive bidding process, i.e., its bid preparation costs.” *Id.*

In *Planning & Design Solutions v. City of Santa Fe*, the New Mexico Supreme Court affirmed the recovery of bid preparation costs to a bidder that successfully protested an award of a public contract for violating competitive bidding laws. 118 N.M. 707 (N.M. 1994). The *Planning & Design Solutions* court explained that “[o]f all the interests involved in competitive bidding, the public interest is the most important.” *Id.* at 710. The court stated that competitive bidding law “protects against the evils of favoritism, nepotism, patronage, collusion, fraud and corruption in the award of public contracts.” *Id.* Although the parties acknowledged there was no formal contract, the court found that this fact did not “foreclose consideration of whether the [public entity] is liable to [bidder] for its costs in preparing the bid.” *Id.* at 714.

⁶ *Id.* at 633.

The *Planning & Design Solutions* court joined other jurisdictions and awarded the disappointed bidder the expenses incurred in preparing and submitting a bid. *Id.* (citations omitted). The court explained that “[a]n award of money damages serves [public] interests. Future misconduct will be deterred by holding public entities accountable for their violations. Also, if bidders sense that the procurement process is inherently unfair--that the cards are stacked against them--they might forgo the bidding process and look to other sources of business. This would reduce the number of quality bidders and limit the choices available to the government entity.” *Id.* at 716 (internal citations omitted).

Similarly, the court in *Meccon, Inc. v. Univ. of Akron* held that a “bidder may recover reasonable bid-preparation costs as damages if it is later determined that the bidder was wrongfully rejected...” -126 Ohio St. 3d 231 (Ohio 2010). The court distinguished between bid preparation costs and lost profits and explained:

"There are good public-policy reasons favoring [the recovery of bid-preparation costs]. First, without some penalty, there is little deterrent to a public entity who fails to follow the competitive-bidding statutes. Second, contractors may be reluctant to bid on public projects when they suspect the competitive bidding will not be conducted fairly. Ultimately, refusal to bid harms the public as the pool of qualified bidders shrinks. Any harm to the public from these types of damages is de minimus when compared to the harm to the public from recovery of lost profits. Allowing recovery of bid-preparation costs will serve to enhance the integrity of the competitive-bidding process."

Id. at 235 (internal citations omitted).

Respondents fail to recognize the harm to the public if bidders, like Byrne & Jones, who challenge the competitive bidding bid process used by public entities are

prohibited from recovering their bid preparation cost upon a successful challenge.⁷

Recovery of bid preparation costs is a limited remedy that will discourage public entities from disregarding competitive bidding requirements. Bidders are in the best position to challenge awards based on favoritism and collusion, because they (unlike members of the public) have knowledge of the facts and circumstances surrounding the bidding process they are involved in.

CONCLUSION

For all of the foregoing reasons, the Trial Court's Judgment, dated May 22, 2014, should be:

1. Reversed and remanded as to the finding that Byrne & Jones does not have standing to enjoin the District's award of the design-build contract to another firm, because the District acted arbitrarily and capriciously and did not permit all bidders to compete on equal terms.
2. Reversed and remanded as to the finding that Byrne & Jones does not have standing to recover its bid preparation costs, because the District acted arbitrarily and capriciously and did not permit all bidders to compete on equal terms and acted arbitrarily and capriciously.

⁷ Respondents state that allowing Byrne & Jones to recover its bid preparation costs "imposes an undue hardship and cost of the public tax payers..." See Respondents' Brief at pg. 21.

CERTIFICATIONS PURSUANT TO RULE 84.06

AND LOCAL RULES 360 AND 363

The undersigned counsel certifies by signature below that this Reply Brief includes the information required by Rule 55.03, complies with the limitations contained in Rule 84.06 and Local Rule 360, and contains 3,875 words based upon the word count function in Microsoft Word for Windows 2010.

/s/ W. Dudley McCarter

CERTIFICATE OF SERVICE

The undersigned certifies by signature below that on August 12, 2014, he served an electronic copy in .pdf format of the foregoing Appellant's Reply Brief upon counsel of record for Respondents pursuant to this Court's electronic filing system.

/s/ W. Dudley McCarter

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ORAL ARGUMENT REQUESTED

